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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS. No. 27768.

APPELLANTS' REPLY TO STATEMENTS IN OPPOSITION TO THIS COURT'S JURISDICTION.

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Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

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The appellee or appellees in each of the five cases, respectively, now docketed in this court under Nos. 858 to 862, inclusive, the titles of such cases being set forth in the margin,* have filed statements in opposition to this court's

* No. 858—*Illinois Commerce Commission, et al. v. Illinois Central Railroad Co.*

No. 859—*Illinois Commerce Commission v. Joseph B. Fleming and Aaron Colnon, trustee of Chicago, Rock Island and Pacific Rwy. Co.*

No. 860—*Illinois Commerce Commission v. Chicago, Burlington & Quincy Railroad Co.*

No. 861—*Illinois Commerce Commission v. Henry A. Scandrett, et al., trustees of property of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*

No. 862—*Illinois Commerce Commission v. A. A. Sprague and Bernard J. Fallon, as receivers of Chicago North Shore and Milwaukee Railroad Co.*

jurisdiction. Since these statements, although cast in slightly variant form, all suggest substantially similar arguments, this reply, though copies of it will be printed and filed under each of the five numbers and titles, respectively, will be identical in all of the five cases.

Appellees' suggestions in opposition to this court's jurisdiction are premised upon certain basic fallacies and reflect serious misconceptions of appellants' contentions. In our earnest view, these fallacies and misconceptions can be briefly pointed out.

The Issues Raised by the Emergency Price Control Act.

In appellants' original statement in support of jurisdiction, it was clearly indicated that the Illinois Commerce Commission and the Attorney General of Illinois, differing with appellees and with the Supreme Court of Illinois, conceived the import of the Emergency Price Control Act to be such as to assert congressional occupation of the field of price fixing in general, but to allow state and federal regulatory commissions to retain their ordinary jurisdiction over public utility rates, subject to the condition, which condition has the force of a jurisdictional prerequisite, that the Price Administrator be given *timely* notice of an intention to increase public utility rates and that the utilities consent to his *timely* intervention. It was further indicated that in our view, which view differs from that of the Supreme Court of Illinois and of appellees, the Illinois Commission as a result of this federal act, had at least the right, which it claimed, if not, indeed, the absolute duty, to ascertain, by matter apparent of record before the Commission and not otherwise, that a utility seeking a price increase had complied with this condition prerequisite to the Commission's jurisdiction.

Appellees dispute this construction of the law. We do

not deem this reply to be an appropriate means of debating the merits of the question raised by the conflict between appellants' reading and the Illinois Supreme Court's reading of the act in question. We think it sufficient to say that, upon the question whether the issue is substantial, as distinct from a consideration of the merits of the issue, this case is remarkably like the *Terminal Railroad Association* v. *Brotherhood of Railway Trainmen and Illinois Commerce Commission*, judgment affirmed, 318 U. S. 1, in which a railroad asserted that the Illinois Public Utilities Act, if construed to support an order relative to cabooses in interstate commerce, would bring that act in conflict with the Railway Labor Act, as well as with the Boiler Inspection Act, the Safety Appliance Act and the Interstate Commerce Act. This court regarded these contentions as conferring jurisdiction, though upon the merits the Illinois Supreme Court was affirmed.

But appellees, in addition to disputing appellants' construction of the Emergency Price Control Act, make the further assertion, which is very misleading unless properly understood, that the act was complied with. This contention is subject to two independent replies.

First: It does not appear, either of record in the proceedings before the Illinois Commission or otherwise, nor do appellees contend that they gave the notice in question **prior to the Illinois Commission's order permanently suspending the rates**. Moreover, they make the point, which we deem to verge upon absurdity, that the fact that the Price Administrator did not appear in the proceedings **in the courts on appeal** from the Commission's order is of some significance. Of course, the whole purpose of giving notice is to permit the United States Government, through the Director of Economic Stabilization or the Price Administrator, to present not only argument but **evidence** before the

Illinois Commission. When a record is closed and the evidence is in, there is little point in the United States Government's merely sending a lawyer into a courtroom to make arguments on a record already completed when the Commission will be represented by its own counsel.

If we are correct in our contention that *timely* notice to the United States Government was a prerequisite to the Commission's jurisdiction, it is no answer to say that, after the record was closed, such notice was given. Such notice would not be timely, nor would it subserve the purpose of the act, nor would it amount to compliance with a jurisdictional prerequisite. Summons after judgment, or notice after final decision, when it is too late to offer proof, can hardly be called jurisdictional notification.

Second: Appellees failed to make the fact of notice apparent upon the record of the Commission. It is quite true that the act contains no language requiring the public utility to make such notice apparent. But we apprehend that when a statute requires notice to be given as a prerequisite to the exercise of jurisdiction by a court or other tribunal, such court or other tribunal has at least the right, if not the duty, to take cognizance of a litigant's or a petitioner's failure to make an affirmative showing that jurisdictional prerequisites have been complied with.

One other observation is most important. Appellees make the highly sophistical argument that since the Commission in effect denied the increase, not only for want of jurisdiction but upon the merits, it gave the United States Government every substantial benefit that the Government could have had if it appeared. But appellees also complain of lack of evidence to support the Commission's order. A few words will suffice to convict the appellees of an egregious fallacy and self-contradiction in this position.

Appellees rely upon the Commission's denial of an in-

crease in order to argue that it would have been of no benefit to the Price Administrator to appear in a proceeding in which, even without his appearance, no increase was granted. But at the same time, they complain that the order denying the increase is invalid for lack of evidence. Now, if, as we contend, the purpose of the Emergency Price Control Act was to permit the Director of Economic Stabilization or the Price Administrator not only to appear but to intervene and offer evidence, and if it is likewise true as appellants contend, that no evidence militating against the increase was offered in his absence, then it can not be said that an order which appellees denounce as invalid for lack of evidence protects the federal government's policy, when it might very well have been that the federal government would have offered the very evidence of the absence of which appellees complain if notice had been given.

The simple truth is that appellees deliberately disregarded the command that, before they might increase their fares, they give notice to the United States government of the proceedings. The question whether this failure to give notice vitiated the proceedings is certainly substantial.

We therefore submit that the question whether Emergency Price Control Act justified the Illinois Commission in refusing the increases here involved is substantial and should be passed upon by this court.

Appellees' Fallacies With Respect to the Due Process Question.

Again let us say that we do not conceive it to be the proper office of this reply to debate the merits of the important questions which we seek to present and argue if jurisdiction is void. However, insofar as appellees'

assertions with respect to the due process question are addressed to this court's jurisdiction, as distinct from a consideration of the merits of the due process issue, we consider it proper to make the following brief observations:

In appellants' original statement in support of jurisdiction, it was made clear that we contended that appellees' evidence, although voluminous, was insufficient to support the increase sought in these proceedings because it failed to give the Commission any basis for those findings that appellees in fact sustained any loss or earned less than an adequate return.

We relied upon the principles that both findings and evidence in support of findings of material facts are required by the due process clause.

If appellants are correct in this contention, it would obviously make no difference whether, in writing their order, they indulged in speculation, treated the hearsay literature of economic records as evidence, or otherwise acted improvidently or wrongfully. **The fact would still remain that the carriers had sought an increase in rates without any adequate showing in support of such increase.** In short, the case would be in a posture like that of a case where a trial court has improperly received hearsay evidence for the defendant, misconceived the law, and otherwise erred in denying plaintiff relief but, where, nevertheless, the plaintiff has offered no competent evidence in support of his case. A judgment adverse to the plaintiff in such a case would be affirmed, even though highly improper evidence was received for the defendant.

Appellees advance another sophistry. They argue that the Illinois Commerce Commission has no standing in this court to assail a judgment on the ground that it denies to the public of Illinois due process of law.

Thus there cannot possibly be any merit in appellees' suggestion that the Illinois Commission decided the case on an adequate non-federal ground; for if there was no evidence to justify the increase, the carriers were not entitled to a reversal even though the commission may have erred fundamentally in its rulings and findings. If, as we say, to grant the carriers an increase would deny due process of law when they failed to show any loss, then to reverse an order denying such increase is *per se* unconstitutional no matter how egregious may have been the fallacies embodied in the Commission's orders.

There are two independent answers to this contention. In the *first* place, under both the Illinois and the federal law, the Attorney General (or other counsel for the public) may properly represent the public in a case affecting utilities' rates or services.

In the *second* place, appellees' argument involves the confusion, which is by no means uncommon, between two premises or propositions, one of which premises is unquestionably the law, while the other premise, though frequently asserted, is not and never has been the law.

It is unquestionably the law that only one affected by an unconstitutional statute may challenge its constitutionality. But it is *not* the law, and it never has been the law, that in order to challenge the constitutionality of a statute, the person "affected", if he is in fact "affected", must be the *person whom the unconstitutional features of the statute injure*. If a law or administrative ruling is unconstitutional as a whole, even if it is unconstitutional only because it injures one particular class, then any person, even though he be not a member of that class, may take advantage of the fact that an unconstitutional act is no act at all.

In the instant case, if we are correct in our contention

that the Illinois court required the Illinois Commission to do an unconstitutional act, namely, unconstitutionally injure the public, then certainly the Commission, every member of which is subject to the Constitution of the United States, may invoke the judgment of this court on appeal from such a decision.

Respectfully submitted,

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